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FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6170

DATE COMPLAINT FILED: January 26, 2009

LAST RESPONSE RECEIVED: March 25, 2009

DATE ACTIVATED: May 5, 2009

EXPIRATION OF STATUTE OF LIMITATIONS:

October 25, 2013 / November 3, 2013

COMPLAINANT:

Jeff Timmer on behalf of the Michigan Republicans

RESPONDENT:

Tuscola County Democratic Committee

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 431(4)
2 U.S.C. § 431(9)
2 U.S.C. § 431(17)
2 U.S.C. § 433(a)
2 U.S.C. § 434
2 U.S.C. § 441d
11 C.F.R. § 100.5(c)
11 C.F.R. § 100.14(b)
11 C.F.R. § 100.22
11 C.F.R. § 102.2
11 C.F.R. § 104.1
11 C.F.R. § 104.3
11 C.F.R. § 105.4
11 C.F.R. § 106.1(a)
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint alleged that the Tuscola County (Michigan) Democratic Committee ("TCDC" or "the Committee"), a local party committee of the Michigan Democratic Party, has

1 failed to register with and report to the Commission as a federal political committee despite
2 exceeding the threshold for federal political committee status by making \$400 in direct
3 contributions to the Kildee for Congress federal campaign and by making expenditures of over
4 \$1,000 for newspaper ads that promoted or supported the election of federal candidates Barack
5 Obama, Joseph Biden, Carl Levin, and Dale Kildee, in violation of 2 U.S.C. §§ 433(a) and 434
6 of the Federal Election Campaign Act of 1971, as amended ("the Act"). In addition, the
7 complaint alleged that the TCDC's "public communications ... probably failed to include the
8 appropriate disclaimer in violation of 2 U.S.C. § 441d(a)." Complaint at 3.

9 The response asserts that the Committee did not meet the threshold for political
10 committee status by making \$1,000 in contributions or by making \$1,000 in expenditures. *See*
11 2 U.S.C. § 431(4)(C). The response admits that the disclaimers "did not state that the ads were
12 not authorized by a candidate or candidate committee," but asserts that the disclaimers otherwise
13 met all of the Act's requirements. Response at 5. Also, the response acknowledges that the
14 Committee failed to disclose its independent expenditures. *Id.*

15 The available information indicates that the TCDC did not meet the Act's expenditure
16 threshold requiring registration and reporting as a political committee. *See* 2 U.S.C. § 431(4)(C).
17 However, it appears that the TCDC failed to place fully compliant disclaimers on its
18 advertisements and failed to file required independent expenditure reports. Nevertheless, for the
19 reasons set forth below, we recommend that the Commission exercise its prosecutorial discretion
20 and dismiss the complaint with a cautionary letter to the Tuscola County Democratic Committee,
21 and close the file. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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II. FACTUAL AND LEGAL ANALYSIS

A. Political Committee Status

The TCDC acknowledges that it is a "local committee of a political party," as defined in the Commission's regulations. See 11 C.F.R. § 100.14(b) (an "organization that by virtue of the by-laws of a political party or the operation of State law is part of the official party structure, and is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State"). Any local committee of a political party which makes contributions aggregating in excess of \$1,000 or makes expenditures aggregating in excess of \$1,000 during a calendar year, which receives contributions in excess of \$5,000 in a calendar year, or which makes payments exempted from the definition of contribution or expenditure aggregating in excess of \$5,000 during a calendar year meets the threshold definition for a political committee. 2 U.S.C. § 431(4)(C); 11 C.F.R. § 100.5(c). Political committees must file a Statement of Organization with the Commission within 10 days of meeting the threshold definition found in 2 U.S.C. § 431(4)(C), and must file reports that comply with 2 U.S.C. § 434. 2 U.S.C. §§ 433(a), 434(a)(1); see also 11 C.F.R. §§ 102.2, 104.1, 105.4.

Citing the Committee's Michigan Bureau of Elections reports (attached to the complaint), the complaint alleges that the TCDC contributed \$400 to Kildee for Congress, and made expenditures of \$1,830 for newspaper advertisements in the *Tuscola County Advertiser*, \$261.23 for an ad in the *Cass City Chronicle*, and \$357.50 for an ad in the *Vassar Pioneer Times*, all of which "referred to Barack Obama, Joe Biden, Carl Levin, and Dale Kildee, and promoted or supported such candidates for Federal office." Complaint at 2. The complaint adds the federal contributions made by TCDC to the total spending for the advertisements in question and alleges

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1 that the TCDC surpassed the threshold for registering and reporting as a political committee.

2 Complaint at 3.

3 The response acknowledges that TCDC made \$400 in contributions to Kildee for
4 Congress, but argues that the contributions should not be added to the expenditures for purposes
5 of determining whether the political committee status threshold has been met, citing 2 U.S.C.
6 § 431(4)(C). Response at 1-2. Neither does the response dispute that the newspaper ads
7 "supported both candidates for federal office and candidates for state and local office," but it
8 asserts that expenses for these advertisements can be allocated, based on the space occupied,
9 among the identified federal candidates and the identified non-federal candidates. Response at 2.
10 The response asserts that the allocated federal expenditure is \$810.52 for the federal portion of
11 the \$2,448.73 total costs, below the \$1,000 threshold for political committee status. *Id.*

12 The Act does in fact set forth separate thresholds of \$1,000 for contributions and \$1,000
13 for expenditures for political committee status. See 2 U.S.C. § 431(4)(C) ("...makes
14 contributions aggregating in excess of \$1,000 or makes expenditures aggregating in excess of
15 \$1,000 during a calendar year ...") (emphasis added). As the Committee made only \$400 in
16 federal contributions, it did not meet the contributions threshold; the Commission must consider
17 separately whether the Committee met the expenditures threshold.

18 In support of its allegation that the Committee met the expenditures threshold, the
19 complaint alleges that the entire costs for the ads in question were expenditures because only
20 federal funds were permitted to be utilized by the TCDC for its newspaper ads that promoted or
21 supported the federal candidates Barack Obama, Joe Biden, Carl Levin and Dale Kildee, and it
22 alleges that the requirement to use only federal funds means that the entire costs constitute
23 expenditures under the Act. Complaint at 2-3, citing 11 C.F.R. § 300.33(c). As a result of

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1 spending \$2,448.73 on the ads, the complaint concludes, the TCDC spent more than \$1,000 on
2 expenditures during 2008 and thus met the Act's political committee status threshold. *Id.* at 3.

3 In determining whether an organization makes an expenditure by paying for
4 communications, the Commission "will analyze whether expenditures for any of an
5 organization's communications made independently of a candidate constitute express advocacy
6 either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." *See*
7 Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595,
8 5606 (February 7, 2007). The newspaper ads, which appear to be identical in content with the
9 exception of one item identified as a "sticker on the front page of the November 1, 2008 Tuscola
10 County Advertiser"¹ all contained express advocacy under 11 C.F.R. § 100.22(a) because the ads
11 are surrounded by a border reading "Vote Jobs-Vote for Working Men and Women" and the
12 body of the ads reads "Vote Tuesday, November 4, 2008 Polls Open 7 a.m. – 8 p.m." and then
13 lists 74 Democrats running for office, from Barack Obama for President to Wisner Township
14 Trustee candidate Carol Jacoby. *See* Attachment 1. The use of the so-called magic word "Vote"
15 next to the list of Democratic nominees in context can have "no other reasonable meaning" than
16 to urge the election of the featured federal candidates. *See* 11 C.F.R. § 100.22(a); *see also* *FEC*
17 *v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238, 249 (1986) (a communication is express
18 advocacy when "it provides, in effect, an explicit directive" to vote for the named candidates).

19 The Commission's regulations further provide that express advocacy includes
20 communications containing an "electoral portion" that is "unmistakable, unambiguous, and
21 suggestive of only one meaning" and about which "reasonable minds could not differ as to

¹ A copy of this sticker included with the response was too dark to read, but the response identifies the sticker as listing the names of 11 candidates, including federal candidates Barack Obama, Joseph Biden, Carl Levin and Dale Kildee. Response at 3.

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whether it encourages actions to elect or defeat" a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b). The newspaper ads contain an electoral portion that is unambiguous and suggestive of only one meaning – an exhortation to vote in support of jobs and in support of working men and women by voting for the 2008 Democratic nominees listed in the ads. Accordingly, under either 11 C.F.R. § 100.22(a) or (b), the newspaper ads appear to constitute express advocacy.

The TCDC newspaper advertisements mention or depict both federal and state candidates. See Attachment 1. TCDC's response to the complaint argues that only the costs associated with the federal portion of the advertisements count towards the \$1,000 expenditure threshold. See generally 11 C.F.R. § 106.1(a)(1) and (c)(3). TCDC provided a copy of its newspaper advertisements and detailed calculations of the federal allocations based on the amount of space in its newspaper ads addressing federal candidates as a proportion of the overall space of the ads, concluding that its total federal expenditures totaled \$810.52. Response at 3-4.² The total federally-allocated expenditure of \$810.52 is less than the Act's \$1,000 expenditure threshold for political committee status. See 2 U.S.C. § 431(4)(C).

Finally, regardless of whether a local party committee exceeds one of the registration thresholds making it a federal political committee, it must finance activities in connection with federal elections with funds that comply with the federal contribution limits and prohibitions. 2 U.S.C. § 441(i)(b); 11 C.F.R. § 102.5(b). The committee must demonstrate through a

² For example, one ad in the *Tuscola County Advertiser* cost a total of \$542, and consists of two portions. See Response at 3. The first portion, which comprises 77% of the total ad space, contains photographs of ten candidates, four of whom are federal candidates. The second portion, which comprises 23% of the total ad space, contains the names and offices sought of 74 candidates, four of which are federal. Response at 3 and Exhibit B (Attachment 1). TCDC calculated the federal allocations as 40% of the first portion and 5.4% of the second portion, then multiplied these percentages by 77% and 23%, respectively, for a total federal allocation of \$173.67. The response's calculations regarding the other ads in the complaint are similar to this analysis.

1 reasonable accounting method that it has received sufficient funds subject to the limitations and
2 prohibitions of the Act to fund its federal contributions and expenditures. Here, TCDC states in
3 its response that the Michigan Campaign Finance Act has equivalent prohibitions and limitations
4 to those in the Act, and that therefore all of the TCDC's funds are appropriate federal funds. See
5 Response at 4-5; *see also* M.C.L. §§ 169.254, 169.242, and 169.244. Further, TCDC's pre-
6 general election and post-general election state disclosure reports for the periods of August 26,
7 2008 through October 19, 2008 and October 20, 2008 through November 24, 2008 do not itemize
8 any donations that would violate the Act's limitations or source prohibitions. (Reports available
9 online at http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=1617, last accessed on
10 September 9, 2009). Accordingly, the TCDC appears to have made its contributions or
11 expenditures using federally permissible funds. As the Committee's federal expenditures of
12 \$810.52 did not exceed the political committee status threshold, and as the Committee's spending
13 on federal expenditures and contributions appears to have been made from federally permissible
14 funds, there is no reason to believe that the Committee violated the Act as to these allegations.

15 **B. Disclaimers**

16 The complaint alleged that the TCDC's public communications "probably" failed to
17 include appropriate disclaimers. Complaint at 3. Any person making a disbursement for
18 communications expressly advocating for a clearly identified federal candidate is responsible for
19 adhering to the disclaimer requirements in 2 U.S.C. § 441d. *See also* 11 C.F.R. § 110.11(a)-(c).
20 The TCDC advertisements expressly advocate for the election of federal candidates Barack
21 Obama, Joseph Biden, Carl Levin, and Dale Kildee. *See* discussion on pp. 5-6, *supra*. The
22 TCDC's advertisements contain some of the elements of a conforming disclaimer (i.e., the name
23 of the entity paying for the advertisement and the P.O. Box mailing address of the TCDC), but

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1 the disclaimers do not state whether the communications are authorized by any federal candidate
2 or candidate's committee. See 2 U.S.C. § 441d and 11 C.F.R. §§ 110.11(a)-(c). The disclaimers
3 on the TCDC's advertisements therefore appear to be in violation of 2 U.S.C. § 441d.

4 **C. Independent Expenditure Reporting**

5 The newspaper ads at issue appear to be independent expenditures pursuant to 2 U.S.C.
6 § 431(17) because, as discussed above, they expressly advocate the election of clearly identified
7 federal candidates, and the advertisements do not appear to have been "made in cooperation,
8 consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's
9 authorized committee, or their agents" 2 U.S.C. § 431(17); see also Attachment 1. Under
10 the Act, every person other than a political committee who makes independent expenditures in
11 excess of \$250 must file a report that discloses information on its expenditures and identify each
12 person who made a contribution in excess of \$200 for the purpose of furthering an independent
13 expenditure. See 2 U.S.C. § 434(c). Even though the TCDC does not appear to have exceeded
14 the political committee status threshold, it still would have been required to report the \$810.52 in
15 allocated federal expenditures for the newspaper advertisements because they were independent
16 expenditures of more than \$250 for the 2008 general election. See 11 C.F.R. § 106.1(a)(1). The
17 TCDC's response acknowledges that it failed to file FEC Form 5 disclosing the expenditures, see
18 Response at 5, and its failure to report these independent expenditures appears to be a violation
19 of the Act. See 2 U.S.C. § 434(c).

20 **D. Conclusion**

21 Although there appears to be no reason to believe that the TCDC has met the threshold
22 definition for a political committee at 2 U.S.C. § 431(4)(C), and therefore there is no reason to
23 believe that the TCDC has failed to register with or report to the Commission as required by

2 U.S.C. §§ 433(a) or 434(a), the TCDC may have violated 2 U.S.C. §§ 434(c) and 441d. However, due to the circumstances of this case including the modest amount in violation, pursuit of this matter would not merit the further use of Commission resources. See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545-6 (Mar. 16, 2007). Accordingly, we recommend that the Commission exercise its prosecutorial discretion and dismiss the complaint, include a cautionary notification to the TCDC regarding the disclaimer requirements and the independent expenditure reporting requirements of the Act in the closing letter, and close the file. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

III. RECOMMENDATIONS

1. Find no reason to believe that the Tuscola County Democratic Committee violated 2 U.S.C. §§ 433(a) or 434(a) by failing to register and report as a political committee.
2. Dismiss the complaint as to the allegations that the Tuscola County Democratic Committee violated 2 U.S.C. §§ 434(c) and 441d.
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letter.
4. Close the file.

Thomasenia P. Duncan
General Counsel

9-11-09

Date

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